Ketua Pengarah Hasil Dalam Negeri v Berjaya Golf & Resort Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-649–09 OF 2022
LEE SWEE SENG, AZIMAH OMAR AND WAN AHMAD FARID JJCA
31 JANUARY 2025

Revenue Law — Income tax — Appeal against finding of High Court — Group Relief provision pursuant to s 44A(5)(a) of the Income Tax Act 1967 ('the ITA') — Irrevocable election on surrendering and claiming of adjusted loss — Whether surrendering company and claimant companies that made irrevocable election under s 44A(2)(a)(iv) of the ITA could revise amount of adjusted loss surrendered and claimed — Whether there was error or mistake on part of taxpayer that justified application for relief under s 131(1) of the ITA

Berjaya Golf & Resort Bhd ('Berjaya Golf'), Berjaya Air Sdn Bhd ('Berjaya Air') and Berjaya Land Sdn Bhd ('Berjaya Land') were members of the Berjaya Group of Companies. In the Year of Assessment ('YA') 2013, Berjaya Air surrendered its losses of RM16,300,200 to Berjaya Land for an amount of RM14,615,512 and Berjaya Golf for an amount of RM1,684, 688. The total amount surrendered of RM16,300,200 was made under the Group Relief provision in s 44A(5)(a) of the Income Tax Act 1967 ('ITA'). Following the exercise of Berjaya Air electing to surrender its losses to Berjaya Land and Berjaya Golf, both of these companies as the first claimant and second claimant respectively made a claim in their respective YA 2013 tax returns under s 44A(2) of the ITA. The Director General of Inland Revenue ('DGIR') carried out a tax audit on Berjaya Land with the result that its aggregate income was reduced from RM14,628,484 to RM3,939,862. That necessitated Berjaya Land revising its group relief form (Form RK-S) such that though the claimants remained the same, yet the amounts surrendered to each of the claimants were revised downward to RM3,939,862 for Berjaya Land and revised upward to RM12,360,338 for Berjaya Golf. Following the revisions, Berjaya Golf submitted a revised tax computation, tax return and Form C (RK-T) together with an application for relief under s 131(1) of the ITA to revise the adjusted loss claimed from the original amount of RM1,684,688 to RM12,360,338. The same was done by Berjaya Land from the original amount of RM14,628,484 to RM3,939,862. The DGIR rejected the application for relief on the basis that an irrevocable election had been made by both Berjaya Air on the one hand and Berjaya Land and Berjaya Golf on the other hand to surrender or claim the amount as the case may be as part of the conditions for group relief that had to be satisfied under s 44A(2)(a)(iv) of the ITA for the submission of tax returns for the relevant YA under s 77A of the ITA. Aggrieved

by the decision of the DGIR, the taxpayer Berjaya Golf appealed against the decision of the DGIR to the Special Commissioners of Income Tax ('SCIT'). In dismissing the taxpayer Berjaya Golf's appeal, the SCIT held that: (a) all three parties in Berjaya Air on the one hand and Berjaya Land and Berjaya Golf on the other, had made an irrevocable election regarding the surrendering and claiming of the adjusted loss and that the amount of adjusted loss claimed had already been stated in their respective tax returns according to the priority as required under s 44A(5)(a) of the ITA; and (b) the SCIT held that the irrevocable election made was such that Berjaya Air could not transfer the unabsorbed loss to Berjaya Golf and that there was no place for reliance on an error or mistake under s 131(1) of the ITA once an irrevocable election had been made. Aggrieved, taxpayer Berjaya Golf appealed to the High Court. The High Court was of the view, inter alia, that: (i) the reach of s 131(1) covered errors or mistakes relating to a group relief situation under s 44A of the ITA; and (ii) Berjaya Golf had acted mistakenly under an unintentional error when submitting its tax return as it thought that it was only entitled to claim up to RM1,684,688 from Berjaya Air in fully utilising the adjusted losses surrendered by Berjaya Air when in reality, Berjaya Land needed only to claim much less after the audit on Berjaya Land with the result that Berjaya Golf could now claim more, whilst still keeping to the same total amount surrendered and claimed. The High Court therefore allowed taxpayer's appeal of Berjaya Golf. Being dissatisfied with the decision of the High Court, the DGIR appealed to the Court of Appeal. The issues that arose for determination were: (A) whether a surrendering company and claimant companies that have made an irrevocable election under s 44A(2)(a)(iv) of the ITA 1967 may subsequently revise the amount of adjusted loss that had been surrendered and claimed inter se between the claimant companies; and (B) whether there was any error or mistake on the part of the taxpayer that justified the application for relief under s 131(1) of the ITA.

Held, dismissing appeal and affirming decision of High Court:

(1) The taxpayer in Berjaya Land should not be penalised for over-estimation and over-payment of its tax for to under-estimate and underpay would result in a penalty and late interest being imposed. An overpayment only resulted in a wait for excess income tax paid to be refunded. There was no good reason why the excess of the losses claimed by Berjaya Land in full could not be used by Berjaya Golf such that the total sum surrendered by Berjaya Air remained the same and so was the total sum claimed by Berjaya Land and Berjaya Golf. Such an interpretation did not do violence to the language used in s 44A(2)(a)(iv) of the ITA but was consistent with the express provision stating conditions for the permitted use of the losses from the surrendering company by the claimant companies and correspondingly what was prohibited (see paras 51–53).

(2) The proper approach as directed by Parliament was for the DGIR to help the taxpayers to harness the benefit provided by s 44A of the ITA and not to hinder them for so long as the requirements of the provision had been fulfilled without offending the 'irrevocable election' rule. After all the amount of adjusted loss surrendered by the surrendering company had not changed one jot and likewise the total amount as claimed to exhaustion by Berjaya Land and the excess claimed by Berjaya Golf remained the same. For the DGIR to take the stand that the 'irrevocable election' extended to the amount claimed inter se between the two claimant companies would leave no room for the application of s 44A(6) of the ITA. Parliament could not have legislated in vain (see paras 59–60).

(3) What was prohibited by the 'irrevocable election' must be strictly interpreted for it had the effect of the taxpayer in Berjaya Golf having more tax imposed on it when it was not allowed to maximise the losses that it could claim to reduce its taxable income proportionately. Even if there was doubt as to whether the 'irrevocable election' once made could not be revoked where the apportioned amount of the loss to be utilised by the claimant companies were concerned, such a doubt was to be resolved in favour of taxpayer Berjaya Golf. The correction, amendment or revision made to the amount of adjusted loss claimed by Berjaya Land and Berjaya Golf did not violate the requirement of an 'irrevocable election' under s 44A(2)(a)(iv) of the ITA and that the clear words of s 44A did not prohibit the taxpayer here in Berjaya Golf from claiming what was now a higher loss when overall the amount of adjusted loss surrendered and claimed remain the same and constant (see paras 61 & 63).

(4) There was an error or mistake in the taxpayer/Berjaya Golf's submission of its original tax returns and claiming of the original amount of RM1,684,688 from Berjaya Air instead of the rightful amount of RM12,360,338. It was a mistake traceable to Berjaya Land when it erroneously or mistakenly did not deduct certain allowable expenses from its income for purpose of tax and so ended up paying more tax than what it should be paying. Such an error or mistake was discovered following a tax audit by the DGIR. It was a genuine mistake for ordinarily one would conduct one's business to pay less rather than paying more tax without running foul of evading tax but arranging one's financial affairs to avoid paying tax. Here there was no element of an afterthought or of mala fide or manipulation or an abuse of the relevant provisions of the ITA in particular s 44A. A balance must be drawn between allowing some flexibility where reliefs due to an 'error or mistake' were concerned without jeopardising the principle of finality in taxation matters (see paras 68–69 & 75).

(5) The related companies within the group ie Berjaya Air, Berjaya Land and Berjaya Golf had not revoked their irrevocable election but that they had merely made adjustments to, the amount to be claimed by the two claimant companies in the light of the tax audit by the DGIR that had substantially reduced the taxable income of Berjaya Land which correspondingly necessitated a lesser sum of the adjusted loss claimed; leaving a bigger sum for Berjaya Golf to claim without adjusting the original total amount surrendered and claimed. There was nothing in the ITA to excluded s 131(1) from its application to s 44A of the ITA (see paras 82–83).

(6) Applying the principle of harmonious interpretation to the two different provisions of the ITA, clearly s 131(1) was not repugnant to s 44A(2)(a)(iv) of the ITA and that room may be given for claiming a relief under an 'error or mistake' which was still reconcilable with the scope of the 'irrevocable election'. Invoking s 131(1) did not have the effect of revoking the 'irrevocable election' but rather that of giving room for an 'error or mistake' to be redeemed. Therefore, the SCIT had erred in holding that s 131(1) of the ITA was not applicable to the taxpayer here. There was unmistakably an 'error or mistake' that could be corrected, amended or revised within the broad and benevolent provision of s 131(1) of the ITA (see paras 89–90).

[Bahasa Malaysia summary

Berjaya Golf & Resort Bhd ('Berjaya Golf'), Berjaya Air Sdn Bhd ('Berjaya Air') and Berjaya Land Sdn Bhd ('Berjaya Land') adalah ahli Berjaya Group of Companies. Pada Tahun Taksiran ('YA') 2013, Berjaya Air menyerahkan kerugiannya sebanyak RM16,300,200 kepada Berjaya Land untuk jumlah RM14,615,512 dan Berjaya Golf untuk jumlah RM1,684,688. Jumlah keseluruhan yang diserahkan sebanyak RM16,300,200 telah dibuat di bawah peruntukan Pelepasan Kumpulan dalam s 44A(5)(a) Akta Cukai Pendapatan 1967 ('ACP'). Berikutan pelaksanaan Berjaya Air memilih untuk menyerahkan kerugiannya kepada Berjaya Land dan Berjaya Golf, kedua-dua syarikat ini masing-masing sebagai penuntut pertama dan penuntut kedua membuat tuntutan dalam penyata cukai YA 2013 di bawah s 44A(2) ACP. Ketua Pengarah Hasil Dalam Negeri ('KPHDN) menjalankan audit cukai ke atas Berjaya Land dengan keputusan agregat pendapatannya dikurangkan daripada RM14,628,484 kepada RM3,939,862. Ia memerlukan Berjaya Land menyemak semula borang pelepasan kumpulannya (Borang RK-S) supaya walaupun pihak yang menuntut kekal sama, namun jumlah yang diserahkan kepada setiap pihak yang menuntut telah disemak dikurangkan kepada RM3,939,862 untuk Berjaya Land dan disemak kenaikan kepada RM12,360,338 untuk Berjaya Golf. Berikutan semakan itu, Berjaya Golf menyerahkan pengiraan cukai yang disemak, penyata cukai dan Borang C (RK-T) berserta permohonan pelepasan di bawah s 131(1) ACP untuk

menyemak semula pelarasan kerugian yang dituntut daripada jumlah asal RM1,684,688 kepada RM12,360,338. Perkara yang sama dilakukan oleh Berjaya Land daripada jumlah asal RM14,628,484 kepada RM3,939,862. KPHDN menolak permohonan pelepasan atas dasar bahawa pilihan yang tidak boleh dibatalkan telah dibuat oleh Berjaya Air di satu pihak dan Berjaya Land dan Berjaya Golf sebaliknya untuk menyerahkan atau menuntut amaun tersebut mengikut mana-mana kes itu sebagai sebahagian daripada syarat untuk Pelepasan Kumpulan yang perlu dipenuhi di bawah s 44A(2)(a)(iv) ACP bagi penyerahan penyata cukai bagi YA yang berkaitan di bawah s 77A ACP. Terkilan dengan keputusan KPHDN, pembayar cukai Berjaya Golf merayu terhadap keputusan KPHDN kepada Pesuruhjaya Khas Cukai Pendapatan ('SCIT'). Dalam menolak rayuan pembayar cukai Berjaya Golf, SCIT memutuskan bahawa: (a) ketiga-tiga pihak di Berjaya Air pada satu pihak dan Berjaya Land dan Berjaya Golf di pihak satu lagi, telah membuat pilihan yang tidak boleh dibatalkan berhubung penyerahan dan tuntutan pelarasan kerugian dan bahawa amaun pelarasan kerugian yang dituntut telah dinyatakan dalam penyata cukai masing-masing mengikut keutamaan seperti yang diperuntukkan di bawah s 44A(5)(a) ACP; dan (b) SCIT memutuskan bahawa pilihan yang tidak boleh dibatalkan yang dibuat sedemikian adalah supaya Berjaya Air tidak dapat memindahkan kerugian yang tidak dapat diserap kepada Berjaya Golf dan bahawa tidak ada tempat untuk bergantung kepada kesilapan atau kekhilafan di bawah s 131(1) ACP sebaik sahaja pilihan yang tidak boleh dibatalkan telah dibuat. Terkilan, pembayar cukai Berjaya Golf merayu ke Mahkamah Tinggi. Mahkamah Tinggi berpendapat, antara lain, bahawa: (i) jangkauan s 131(1) meliputi kesilapan atau kekhilafan yang berkaitan dengan situasi pelepasan kumpulan di bawah s 44A ACP; dan (ii) Berjaya Golf telah bertindak dengan salah di bawah kesilapan yang tidak disengajakan semasa mengemukakan penyata cukainya kerana berpendapat ia hanya berhak menuntut sehingga RM1,684,688 daripada Berjaya Air dalam menggunakan sepenuhnya pelarasan kerugian yang diserahkan oleh Berjaya Air sedangkan pada hakikatnya, Berjaya Land hanya perlu menuntut jumlah yang lebih sedikit selepas pengauditan ke atas Berjaya Land, tetapi kini masih boleh menuntut jumlah yang sama dengan Berjaya Land. menyerah diri dan menuntut. Oleh itu, Mahkamah Tinggi membenarkan rayuan pembayar cukai terhadap Berjaya Golf. Oleh kerana tidak berpuas hati dengan keputusan Mahkamah Tinggi, KPHDN merayu kepada Mahkamah Rayuan. Isu yang timbul untuk penentuan adalah: (A) sama ada syarikat penyerahan dan syarikat penuntut yang telah membuat pilihan yang tidak boleh dibatalkan di bawah s 44A(2)(a)(iv) ACP 1967 kemudiannya boleh menyemak semula amaun pelarasan kerugian yang telah diserahkan dan dituntut antara syarikat yang menuntut; dan (B) sama ada terdapat sebarang kesilapan atau kekhilafan di pihak pembayar cukai yang mewajarkan permohonan pelepasan di bawah s 131(1) ACP.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Pembayar cukai di Tanah Berjaya tidak boleh dihukum kerana lebihan anggaran dan terlebih bayar cukainya kerana kurang anggaran dan kurang bayar akan mengakibatkan penalti dan faedah lewat dikenakan. Lebihan bayaran hanya menyebabkan menunggu lebihan cukai pendapatan yang dibayar untuk dipulangkan. Tidak ada sebab kukuh mengapa lebihan kerugian yang dituntut oleh Berjaya Land sepenuhnya tidak dapat digunakan oleh Berjaya Golf sehingga jumlah wang yang diserahkan oleh Berjaya Air kekal sama dan begitu juga jumlah yang dituntut oleh Berjaya Land dan Berjaya Golf. Tafsiran sedemikian tidak melakukan kemudaratan terhadap bahasa yang digunakan dalam s 44A(2)(a)(iv) ACP tetapi konsisten dengan peruntukan nyata yang menyatakan syarat untuk penggunaan yang dibenarkan bagi kerugian daripada syarikat penyerahan oleh syarikat yang menuntut dan sejajar dengan apa yang dilarang (lihat perenggan 51–53).

(2) Pendekatan yang betul seperti yang diarahkan oleh Parlimen adalah untuk KPHDN membantu pembayar cukai untuk memanfaatkan faedah yang diperuntukkan oleh s 44A ACP dan tidak menghalang mereka selagi keperluan peruntukan itu telah dipenuhi tanpa melanggar peraturan 'pilihan yang tidak boleh dibatalkan'. Lagipun jumlah pelarasan kerugian yang diserahkan oleh syarikat penyerahan tidak berubah satu jot dan begitu juga jumlah ang didakwa digunakan oleh Berjaya Land dan lebihan yang dituntut oleh Berjaya Golf kekal sama. Bagi KPHDN mengambil pendirian bahawa 'pilihan yang tidak boleh dibatalkan' diperluaskan kepada jumlah yang dituntut antara kedua-dua syarikat penuntut tidak akan memberi ruang untuk pemakaian s 44A(6) ACP. Parlimen tidak mungkin membuat undang-undang dengan sia-sia (lihat perenggan 59–60).

(3) Apa yang dilarang oleh 'pilihan yang tidak boleh dibatalkan' mesti ditafsirkan dengan tegas kerana ia mempunyai kesan pembayar cukai di Berjaya Golf mempunyai lebih banyak cukai yang dikenakan ke atasnya apabila ia tidak dibenarkan untuk memaksimumkan kerugian yang boleh dituntut untuk mengurangkan pendapatan bercukainya secara berkadar. Walaupun terdapat keraguan sama ada 'pilihan yang tidak boleh dibatalkan' yang pernah dibuat tidak boleh dibatalkan di mana amaun kerugian yang diagihkan untuk digunakan oleh syarikat penuntut berkenaan, keraguan tersebut harus diselesaikan memihak kepada pembayar cukai Berjaya Golf. Pembetulan, pindaan atau semakan yang dibuat kepada amaun pelarasan kerugian yang dituntut oleh Berjaya Land dan Berjaya Golf tidak melanggar keperluan 'pilihan yang tidak boleh dibatalkan' di bawah s 44A(2)(a)(iv) ACP dan bahawa kata-kata yang jelas dalam s 44A tidak melarang pembayar cukai di sini di Berjaya

Golf daripada membuat penyelarasan kerugian yang lebih tinggi dan jumlah kerugian keseluruhan yang telah diselaraskan sekarang. yang didakwa tetap sama dan tetap (lihat perenggan 61 & 63).

(4) Terdapat kesilapan atau kekhilafan dalam penyerahan penyata cukai asal pembayar cukai/Berjaya Golf dan menuntut jumlah asal RM1,684,688 daripada Berjaya Air dan bukannya jumlah yang sah sebanyak RM12,360,338. Ia adalah satu kesilapan yang boleh dikesan ke Berjaya Land apabila ia tersilap atau terkhilaf tidak memotong perbelanjaan tertentu yang dibenarkan daripada pendapatannya untuk tujuan cukai dan akhirnya membayar cukai lebih daripada apa yang sepatutnya dibayar. Kesilapan atau kekhilafan sedemikian telah ditemui berikutan audit cukai oleh KPHDN. Ia adalah satu kesilapan yang nyata bagi seseorang yang biasa akan menjalankan perniagaan seseorang untuk membayar lebih sedikit daripada membayar lebih cukai tanpa melanggar pengelakan cukai tetapi mengatur hal ehwal kewangan seseorang untuk mengelak daripada membayar cukai. Di sini tiada unsur pemikiran semula atau mala fide atau manipulasi atau penyalahgunaan peruntukan berkaitan ACP khususnya s 44A. Keseimbangan mesti dibuat antara membenarkan sedikit fleksibiliti di mana pelepasan disebabkan oleh 'kesilapan atau kekhilafan' berkenaan tanpa menjejaskan prinsip muktamad dalam urusan percukaian (lihat perenggan 68–69 & 75).

(5) Syarikat-syarikat berkaitan dalam kumpulan itu iaitu Berjaya Air, Berjaya Land dan Berjaya Golf tidak membatalkan pilihan yang mereka tidak boleh batal tetapi mereka hanya membuat pelarasan kepada, jumlah yang perlu dituntut oleh kedua-dua syarikat penuntut berdasarkan audit cukai oleh KPHDN yang telah mengurangkan dengan ketara pendapatan bercukai Berjaya Land yang menyebabkan jumlah yang berkurang kepada pelarasan kerugian yang dituntut; meninggalkan jumlah yang lebih besar untuk Berjaya Golf tuntut tanpa melaraskan jumlah asal yang diserahkan dan dituntut. Tiada apa-apa pun dalam ACP untuk mengecualikan s 131(1) daripada pemakaiannya kepada s 44A ACP (lihat perenggan 82–83).

(6) Menggunakan prinsip tafsiran harmoni kepada dua peruntukan ACP yang berbeza, jelas s 131(1) tidak bertentangan dengan s 44A(2)(a)(iv) ACP dan ruang itu boleh diberikan untuk menuntut pelepasan di bawah 'kesilapan atau kekhilafan' yang masih boleh diselaraskan dengan skop pilihan yang tidak boleh dibatalkan. Menggunakan s 131(1) tidak mempunyai kesan membatalkan 'pilihan yang tidak boleh dibatalkan' sebaliknya memberi ruang kepada 'kesilapan atau kekhilafan' untuk ditebus. Oleh itu, SCIT telah terkhilaf dalam menyatakan bahawa s 131(1) ACP tidak terpakai kepada pembayar cukai di sini. Jelas terdapat 'kesilapan atau kekhilafan' yang boleh diperbetulkan, dipinda atau

A disemak dalam peruntukan yang luas dan tanpa niat jahat dalam s 131(1) ACP (lihat perenggan 89–90).

Cases referred to

Ben-Odeco Ltd v Powlson (Inspector of Taxes) 1978 STC 460, HL (refd)
B *Extramoney Ltd v Commissioner of Inland Revenue* [1997] 2 HKC 38, HC (refd)
Hamdan bin Abdul Hamid @ Hamid bin Abdul Rahman v Ketua Pengarah Hasil Dalam Negeri [2010] 4 MLJ 556, HC (refd)
J Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [1999] MSTC 3037 (refd)
C *Ketua Pengarah Hasil Dalam Negeri v OKA Concrete Industries Sdn Bhd* (2015) MSTC 30-091 (refd)
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263, SC (refd)
Littman v Barron (Inspector of Taxes) [1951] Ch 993, CA (refd)
D *Mohd Najib bin Hj Abd Razak & Anor v Government of Malaysia and another appeal* [2023] 6 MLJ 483; [2023] 10 CLJ 329, FC (refd)
Moulin Global Eyecare Trading Ltd (in liq) v Commissioner of Inland Revenue & Anor [2012] 3 HKC 272, CA (refd)
E *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)
Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2020] 1 MLJ 141; [2020] 1 CLJ 1, FC (refd)
F *Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals* [2017] 2 MLJ 421, FC (refd)

Legislation referred to

Income Tax Act 1967 ss 44A, 44A(2), (2)(a)(iv), (5), (5)(a), (6), 70A, 77A, 106(3), 131, 131(1), (5), Form C
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Appeal from: *Berjaya Golf & Resort Bhd v Ketua Pengarah Hasil Dalam Negeri* [2022] MLJU 3190 (High Court, Kuala Lumpur)

Normareza bt Mat Rejab (with Syazana Safiah bt Rozman) (Inland Revenue Board of Malaysia) for the appellant.
H *S Saravana Kumar (with Nur Hanina bt Mohd Azham) (Rosli Dahlan Saravana Partnership) for the respondent.*

Lee Swee Seng JCA (delivering judgment of the court):

I

[1] The approach of the Director General of Inland Revenue ('DGIR') to taxation of companies is that profits made are generally subject to tax and that losses are not. Whilst the DGIR takes a cut of the profit made by a company, it does not correspondingly share in the losses but rather that the company must

alone absorb its losses. However for companies within the same group, some leeway is given in that the losses of one company may be surrendered to reduce the taxable gains made by other companies within the group, subject however to some conditions of group relief under s 44A(2) of the Income Tax Act 1967 ('the ITA'). A B

[2] One of the conditions is that the company making the transfer of the loss to another company or companies within the group shall make an irrevocable election under s 44A(2)(a)(iv) of the ITA. The question is whether the irrevocable election is confined only to the companies to which the losses are transferred and the amount surrendered and claimed accordingly or does the irrevocable election extend to cover the actual amount claimed by the claimant companies, if more than one, in the order of priority specified. C

[3] In other words, having made an election on the companies for the surrender of the losses and the amount to be surrendered, can the surrendering company and the affected claimant companies correct, amend or revise the amount claimed as between the two companies receiving the benefit of the surrender such that the total amount surrendered to reduce the taxable income of the two companies still remains the same but that the amount surrendered to the first company had been substantially reduced and that to the second company had been substantially increased. D E

[4] The natural question would be why this change in the amount to be surrendered to the two companies within the group that are making profits. It is an admitted fact that after the irrevocable election had been made, there was a tax audit carried out with respect to the first company identified within the group to receive the benefit of the surrender of losses with the result that the taxable income was very much reduced. The result was that only a much smaller portion of the surrendered losses was needed to completely set-off the gains. The excess would be wasted if it could not be surrendered for the second company whose gains far exceeded the balance of the losses that could not be utilised by the first company because its taxable income had been substantially reduced after the tax audit by the DGIR. F G H

[5] The question that arises is whether the irrevocable election is only with respect to electing the companies that are to receive the benefit of the surrender of the losses and not the amount and further whether the amount is amenable to a correction, amendment or revision because of an error or mistake that was subsequently discovered arising out of a tax audit exercise by the DGIR. I

A THE APPLICATION FOR RELIEF BEFORE THE DGIR

[6] The aggrieved taxpayer here is Berjaya Golf & Resort Bhd ('Berjaya Golf') which is the second claimant claiming the losses of Berjaya Air Sdn Bhd ('Berjaya Air'), the surrendering company. The first claimant of the losses of Berjaya Air was Berjaya Land Sdn Bhd ('Berjaya Land'). It is not disputed that all the three companies are members of the Berjaya Group of Companies.

[7] In the Year of Assessment ('YA') 2013, Berjaya Air surrendered its losses of RM16,300,200 to Berjaya Land as the first claimant for an amount of RM14,615,512 and Berjaya Golf as the second claimant for an amount of RM1,684,688. The total amount surrendered of RM16,300,200 for the purpose of this exercise was made under the group relief provision in s 44A(5)(a) of the ITA.

[8] Following the above exercise of Berjaya Air electing to surrender its losses to Berjaya Land and Berjaya Golf, both of these companies as the first claimant and second claimant respectively made a claim in their respective YA 2013 tax returns under s 44A(2) of the ITA for the loss surrendered by Berjaya Air.

[9] The DGIR carried out a tax audit on Berjaya Land with the result that its aggregate income was reduced from RM14,628,484 to RM3,939,862. That necessitated Berjaya Land revising its group relief form (Form RK-S) on 25 September 2014 such that though the claimants remained the same, yet the amounts surrendered to each of the claimants were revised downward to RM3,939,862 for Berjaya Land and revised upward to RM12,360,338 for Berjaya Golf.

[10] Following the above revisions, Berjaya Golf submitted on 29 September 2014 a revised tax computation, tax return and Form C (RK-T) together with an application for relief under s 131(1) of the ITA to revise the adjusted loss claimed from the original amount of RM1,684,688 to RM12,360,338. The same was done by Berjaya Land on the same date from the original amount of RM14,628,484 to RM3,939,862.

[11] Berjaya Golf's application for relief was premised on the following:

> In view of the finalisation of the tax audit of Berjaya Land Berhad (C 04889206-08) and the subsequent revised tax return of Berjaya Land Berhad to revise the losses claimed from Berjaya Air Sdn Bhd (C 04863623-01) from RM14,615,512 to RM3,939,862; and the revised tax return of Berjaya Air Sdn Bhd to revise the losses surrendered to Berjaya Golf Resort Berhad (the Company) from RM1,684,688 to RM12,360,338.

[12] The DGIR on 3 June 2015 rejected the application for relief on the basis that an irrevocable election had been made by both Berjaya Air on the one hand and Berjaya Land and Berjaya Golf on the other hand to surrender or claim the amount as the case may be as part of the conditions for group relief that had to be satisfied under s 44A(2)(a)(iv) of the ITA for the submission of tax returns for the relevant YA under s 77A of the ITA.

[13] Aggrieved by the decision of the DGIR, the taxpayer Berjaya Golf made an application before the Special Commissioners of Income Tax ('SCIT') which application was deemed to be an appeal from the decision of the DGIR.

AT THE SPECIAL COMMISSIONERS OF INCOME TAX ('SCIT')

[14] In the case stated before the SCIT the agreed issue was whether Berjaya Golf as the taxpayer can claim the excess of the surrendered loss of Berjaya Air under ss 44A and 131(1) of the ITA.

[15] The SCIT held that all three parties in Berjaya Air on the one hand and Berjaya Land and Berjaya Golf on the other, had made an irrevocable election regarding the surrendering and claiming of the adjusted loss and that the amount of adjusted loss claimed had already been stated in their respective tax returns according to the priority as required under s 44A(5)(a) of the ITA. The SCIT held that the irrevocable election made was such that Berjaya Air cannot transfer the unabsorbed loss to Berjaya Golf and that there was no place for reliance on an error or mistake under s 131(1) of the ITA once an irrevocable election had been made.

[16] The SCIT therefore dismissed Berjaya Golf's appeal.

BEFORE THE HIGH COURT

[17] The taxpayer Berjaya Golf, being aggrieved by the decision, appealed to the High Court. The High Court was persuaded by the argument of Berjaya Golf that the revision made by it had stemmed from the tax audit by the DGIR on Berjaya Land with the result that Berjaya Land's chargeable gain had been reduced. There was thus an error that needed correction on the part of the taxpayer Berjaya Golf arising out of the audit by the DGIR on Berjaya Land and therefore resort to the relief under s 131(1) of the ITA was appropriate.

[18] The High Court had regard to the purpose of s 44A of the ITA which is to enable a company with losses to pass the losses to other companies in the group that were making profits and thus having chargeable income to have that chargeable income reduced by the amount of the losses surrendered to these profit-making companies.

A **[19]** The High Court held that the election made was consistent with the requirements of s 44A(5)(a) that merely requires the amount of adjusted loss must be first fully deducted to the first claimant in this case Berjaya Land before the excess can be surrendered and deducted by the second claimant Berjaya Golf.

B

[20] The High Court further held that what was 'irrevocable' under s 44A of the ITA was the surrender of losses and here the taxpayer is not revoking the surrender of the losses but only revising the amount. The High Court reasoned that the parties could not have made an irrevocable election on the specific amount surrendered as the amount surrendered is governed solely by s 44A(5) of the ITA in that Berjaya Land as the first claimant has to fully utilise the adjusted losses before the taxpayer in Berjaya Golf is entitled to the excess.

C

D **[21]** The High Court was of the view that s 131(1) that allows the taxpayer to obtain relief for error or mistake made in the return furnished is not inconsistent with the irrevocable election made by the parties. The High Court was of the considered opinion that the reach of s 131(1) covers errors or mistakes relating to a group relief situation under s 44A of the ITA.

E

[22] The High Court was left in no doubt that Berjaya Golf had acted mistakenly under an unintentional error when submitting its tax return as it thought that it was only entitled to claim up to RM1,684,688 from Berjaya Air in fully utilising the adjusted losses surrendered by Berjaya Air when in reality, Berjaya Land needed only to claim much less after the audit on Berjaya Land with the result that Berjaya Golf could now claim more, whilst still keeping to the same total amount surrendered and claimed.

F

G **[23]** The High Court therefore allowed taxpayer's appeal of Berjaya Golf.

[24] The DGIR being dissatisfied with the decision of the High Court, appealed to the Court of Appeal.

H AT THE COURT OF APPEAL

[25] The issues before the Court of Appeal may be stated as follows:

(a) whether a surrendering company and claimant companies that have made an irrevocable election under s 44A(2)(a)(iv) of the ITA 1967 may subsequently revise the amount of adjusted loss that have been surrendered and claimed inter se between the claimant companies; and

I

(b) whether there is any error or mistake on the part of the taxpayer that justifies the application for relief under s 131(1) of the ITA.

Whether a surrendering company and claimant companies that have made an irrevocable election under s 44A(2)(a)(iv) of the ITA 1967 may subsequently revise the amount of adjusted loss that have been surrendered and claimed inter se between the claimant companies

[26] We accept the fact that an 'irrevocable election' cannot be clearly made if what is elected is not stated where the amounts to be surrendered and claimed by one or more companies within the group is concerned. Any election made under s 44A has to fulfil the conditions set out in s 44A(2) of the ITA which would include stating the amount to be surrendered such that the DGIR can ascertain that it is not more than 70% of the current year business loss that is being surrendered to one or more of its related companies within the group.

[27] Section 44A(2) provides as follows:

> 44A(2) Subsection (1) shall apply if for any year of assessment —
>
> (a) the surrendering company and the claimant company —
>
> (i) are related companies throughout the basis period for that year of assessment and the twelve months period immediately preceding that basis period;
>
> (ii) have paid-up capital in respect of ordinary share of more than two million five hundred thousand ringgit at the beginning of the basis period for that year of assessment;
>
> (iii) have twelve months basis period ending on the same day;
>
> (iv) *make an irrevocable election to surrender or claim an amount of adjusted loss in the return furnished for that year of assessment under section 77A*; and
>
> (v) are subject to tax at the appropriate rate as specified in paragraph 2 of part I of Schedule I; and
>
> (b) the claimant company has a defined aggregate income for that year of assessment. (Emphasis added.)

[28] The learned senior revenue counsel ('SRC') had summarised the conditions to be fulfilled as follows:

> (a) the surrendering company and claimant must be related companies throughout the specified period, have a paid-up capital of more than RM2.5mil, have same basis period, make irrevocable election to surrender or claim in their tax return for that year of assessment and be subjected to the appropriate tax rate; and (b) the claimant company has a defined aggregate income in that year of assessment.

[29] The learned SRC agreed that Berjaya Air, Berjaya Land and Berjaya Golf ('the taxpayer') have met all the conditions prescribed in s 44A(2) of the

ITA and thus qualified for the group relief.

[30] More than that the requirements of s 44A(5) and (6) have also been satisfied. The provision reads as follows:

> (5) Where the amount of adjusted loss is —
>
> (a) surrendered to more than one claimant company, *the adjusted loss shall be fully deducted in accordance with subsection (4) to the first claimant company before any excess of the adjusted loss is surrendered and deducted in accordance with that subsection to the second claimant company and so on; or*
>
> (b) claimed by a claimant company from more than one surrendering company, the adjusted loss surrendered from the first surrendering company shall be deducted in accordance with subsection (4) to that claimant company before the adjusted loss is surrendered from the second surrendering company be deducted in accordance with that subsection to that claimant company and so on.
>
> ...
>
> (6) For the purpose of subsection (5), the surrendering company and the claimant company shall ascertain the order of priority in respect of the adjusted loss surrendered or claimed but if that loss cannot be effected in accordance with the order of priority specified by any surrendering company or claimant company the amount of adjusted loss surrendered or claimed shall be dealt with in such manner as the Director General thinks reasonable and proper. (Emphasis added.)

[31] As pointed out by learned counsel for Berjaya Golf, under s 44A(6) of the ITA, the surrendering company and the claimant companies are entitled to ascertain the order of priority in respect of the adjusted loss surrendered. All three companies ie Berjaya Air, Berjaya Land (the first claimant company) and the taxpayer Berjaya Golf (the second claimant company) made an irrevocable election pursuant to s 44A(2)(a)(iv) of the ITA that the order of priority in surrendering and claiming such losses shall be firstly to Berjaya Land (the first claimant company) and secondly to the taxpayer Berjaya Golf (the second claimant company).

[32] As provided for under s 44A(5)(a) of the ITA, Berjaya Land (the first claimant company) shall fully utilise the allocated losses and then Berjaya Golf (the second claimant company) is only entitled to the excess.

[33] In essence and substance, as required under s 44A(2)(a)(iv) of the ITA, the surrendering company and the claimant companies had made the following irrevocable elections as follows:

(a) the *surrendering of losses* by Berjaya Air and *the claiming of such losses* by Berjaya Land (first claimant company) and Berjaya Golf (second claimant company);

(b) the *order of priority* in respect of the surrendering and claiming of such losses to be first to Berjaya Land and secondly to Berjaya Golf; and

(c) *the total amount of losses surrendered and claimed to be up to seventy per cent of Berjaya Air's (the surrendering company's) adjusted losses*, this to be fully utilised firstly by Berjaya Land (the first claimant company) *and then subsequently fully utilised by the taxpayer Berjaya Golf* (the second claimant company).

[34] Berjaya Land together with Berjaya Golf had elected to fully utilise the losses surrendered by Berjaya Air between themselves. Initially, in good faith Berjaya Land had fully utilised the losses claimed from and surrendered by Berjaya Air to the tune of RM14,615,512. The balance of RM1,684,688 remaining was available to be surrendered to and claimed by Berjaya Golf as the second claimant company and was so claimed.

[35] Subsequently there was an audit by the DGIR with the consequence that Berjaya Land's aggregate income was reduced from RM14,628,484 to RM3,952,834. After the deduction of a donation of RM12,972 the net aggregate income is RM3,939,862. It was not something that Berjaya Land could have anticipated for it was prepared to pay tax based on its higher income of RM14,628,484.

[36] It was only natural then for Berjaya Air, on 25 September 2014, to revise the group relief form ie Form RK-S and surrendered the same amount of RM16,300,200, where Berjaya Land as the first claimant company claimed RM3,939,862 and the taxpayer Berjaya Golf as the second claimant company claimed RM12,360,338. This is illustrated in the diagram below prepared by learned counsel for the taxpayer Berjaya Golf:

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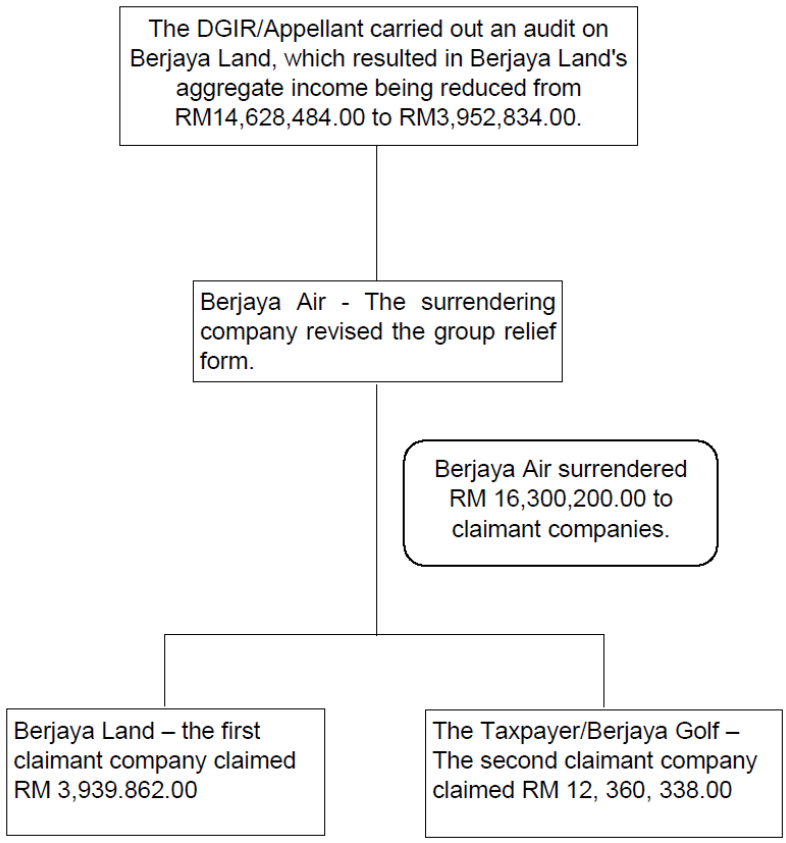
The DGIR/Appellant carried out an audit on Berjaya Land, which resulted in Berjaya Land's aggregate income being reduced from RM14,628,484.00 to RM3,952,834.00.
Berjaya Air - The surrendering company revised the group relief form.
Berjaya Air surrendered RM 16,300,200.00 to claimant companies.
Berjaya Land – the first claimant company claimed RM 3,939.862.00
The Taxpayer/Berjaya Golf – The second claimant company claimed RM 12, 360, 338.00

[37] On 29 September 2014, the taxpayer Berjaya Golf filed its revised tax computations, tax returns, Form RK-T together with an application for relief under s 131(1) of the ITA to revise the adjusted loss claimed from RM1,684,688 to RM12,360,338.

[38] Correspondingly, on the same day, Berjaya Land filed its revised tax computations, tax returns and Form RK-T to revise the adjusted loss claimed from RM14,615,512 to RM3,939,862.

[39] However, the DGIR took the view that once an 'irrevocable election' had been made under s 44A(2)(a)(iv) of the ITA, it cannot be revoked and that would include the fact that the election cannot be changed, revised or amended. On 3 June 2015, the taxpayer Berjaya Golf was informed by the DGIR that the taxpayer Berjaya Golf's s 131(1) application was rejected.

[40] On 4 September 2015, Berjaya Golf made an appeal under s 131(5) of

the ITA against the DGIR's rejection and challenged the decision before the SCIT. A

[41] The question above turns on the scope of the 'irrevocable election' made as to whether it is confined to the election of the surrendering company and the claimant companies and the total amount surrendered and claimed and not a revision of the amount claimed inter se by the companies within the group for so long as the companies claiming remain the same and the total amount claimed does not exceed the amount surrendered. B

C

[42] The learned SRC had framed the issue this way with respect to the instant case as: can Berjaya Air, Berjaya Land, and Berjaya Golf (the taxpayer) revise their tax returns to change the amount of adjusted loss already surrendered and claimed, despite having made an irrevocable election as part of the eligibility conditions? It needs to be stated that the amount of adjusted loss surrendered and claimed remain the same and the change is only with respect to the apportionment of the amount claimed inter se between the two claimant companies. D

[43] It is a principle of statutory interpretation of a taxing statute that before any tax may be imposed, the obligation to pay must be clearly stated and that any ambiguity is to be resolved in favour of the taxpayer. Here the 'irrevocable election' is with respect to 'surrender or claim an amount of adjusted loss in the return furnished for the year of assessment.' Here the amount remains the same and has not changed and neither has it been revoked. The only thing that has been changed or revised is the amount apportioned as being claimed between the two claimant companies. E

F

[44] Such a change or revision does not derogate from the fact that the 'irrevocable election' remains in place. The amount of loss claimed is the same. The 'irrevocable election' covers the surrendering company, the claimant company or companies, the amount surrendered and claimed accordingly. Does the 'irrevocable election' extend to the amount claimed by each of the claimant company if there are more than one company? We are of the considered opinion that it does not both from the language used and the rationale and reasonableness of it. G

H

[45] The pith and substance of the 'irrevocable election' must be the identification and selection which amount to an election here of the surrendering company, the two claimant companies and the amount surrendered and the same amount claimed, if the amount can be completely exhausted. If Parliament had intended the 'irrevocable election' to cover and apply to the amount surrendered and claimed as inter se between the two claimant companies, then it must say so in express language. I

[46] In such a case s 44A(2)(a)(iv) of the ITA would be worded as follows:

> (iv) make an irrevocable election to surrender or claim an amount of adjusted loss in the return furnished for that year of assessment under section 77A *and the irrevocable election shall apply to the amount claimed by each of the claimants*; (Emphasis added.)

[47] Without those additional qualifying words in bold above, the 'irrevocable election' has been complied with for so long as the election has been made with respect to the surrendering company, the claimant companies, the amount surrendered and claimed accordingly. The rationale must be certainly that the parties involved should be firm and not fickle-minded and not dissipating the time of the DGIR with unnecessary change of mind on the part of the taxpayers concerned and that there should be finality in tax matters.

[48] It is after all a concession given where none existed before to help buffer the tax exposure of companies within the group and so the conditions prescribed must be complied with strictly. It is just a simple arithmetical calculation — first identifying the amount to be surrendered by the surrendering company and the full exhaustion of that amount by the claimant companies identified to have their taxable income reduced accordingly.

[49] Rationale-wise and reasonably speaking no one is harmed, least of all the DGIR as the same tax is collected irrespective of the change in the amount utilised by each of the two claimant companies.

[50] It was also reasonable as here Berjaya Land had acted on an abundance of caution not to deduct certain expenses for tax purpose and ending up having to pay more tax than is really required. The tax audit carried out by the DGIR did not result in what most people would expect which is that of a higher taxable income because perhaps some deductions are not allowed for tax purpose. With its reduced tax income from RM14,628,484 to RM3,952,834 the amount claimed by Berjaya Land would result in a surplus of RM12,360,338 left which Berjaya Golf now would like to claim for its taxable income was higher than what was previously claimed.

[51] The taxpayer in Berjaya Land should not be penalised for over-estimation and over-payment of its tax for to under-estimate and underpay would result in a penalty and late interest being imposed. An overpayment only results in a wait for excess income tax paid to be refunded.

[52] We see no good reason why the excess of the losses claimed by the first claimant company in full could not be used by the second claimant company

such that the total sum surrendered by Berjaya Air remains the same and so is the total sum claimed by the first claimant company and the second claimant company.

[53] Such an interpretation does not do violence to the language used in s 44A(2)(a)(iv) of the ITA but is consistent with the express provision stating conditions for the permitted use of the losses from the surrendering company by the claimant companies and correspondingly what is prohibited. We concur with the High Court when it concluded as follows:

> [28] It can be clearly seen that the purpose of s 44A of the ITA is to enable company with excess losses which it has no use for itself to pass such losses to its sisters company. This court finds that the election made by BASB, BLB and the appellant in the above is consistent with the wording of s 44A(5)(a) of the ITA which stipulates that the amount of adjusted loss surrendered by BASB (the surrendering company) must be fully deducted to BLB as the first claimant company before any excess of the adjusted loss is surrendered and deducted to the appellant as the second claimant company.

[54] In fact, nowhere in s 44A(5)(a) is it stated that the amount to be claimed by more than one claimant company must be stated as the emphasis and focus is on the amount of adjusted loss surrendered and claimed and not on the amount claimed inter se between two or more claimant companies. Section 44A(5)(a) of the ITA was careful to state as follows:

> (5) Where the amount of adjusted loss is —
>
> (a) surrendered to more than one claimant company, *the adjusted loss shall be fully deducted in accordance with subsection (4) to the first claimant company before any excess of the adjusted loss is surrendered and deducted in accordance with that subsection to the second claimant company and so on*; (Emphasis added.)

[55] This principle of exhaustion applies such that the adjusted loss is to be deducted fully for the first claimant company before any excess is used by the second company and correspondingly the excess is to be fully deducted before any excess after that deduction is to be used by the third company for example.

[56] Thus if later it is discovered either through a tax audit by DGIR or by the taxpayer that an error has been made in the utilisation of the adjusted loss for the first claimant company assuming that the taxable income has increased and so a corresponding higher amount of adjusted loss could be claimed from the surrendering company, there would be correspondingly less adjusted loss that could be claimed by the second claimant company with the result that if there is a third claimant company, it may not have any excess left of the adjusted loss to claim.

[57] This has already been anticipated by the ITA when the amendment was introduced and so in such a case s 44A(6) applies and we read:

> (6) For the purpose of subsection (5), *the surrendering company and the claimant company shall ascertain the order of priority* in respect of the adjusted loss surrendered or claimed but *if that loss cannot be effected in accordance with the order of priority specified by any surrendering company or claimant company the amount of adjusted loss surrendered or claimed shall be dealt with in such manner as the Director General thinks reasonable and proper*. (Emphasis added.)

[58] The above is just one example of a situation where the adjusted loss cannot be effected with the order of priority specified by the surrendering company or the claimant company. Discretion is reposed on the DGIR to deal with the order of priority as he thinks reasonable and proper, having regard to the purpose of the amendment and the bona fide intention of the parties.

[59] The proper approach as directed by Parliament is for the DGIR to help the taxpayers to harness the benefit provided by s 44A of the ITA and not to hinder them for so long as the requirements of the provision have been fulfilled without offending the 'irrevocable election' rule. After all the amount of adjusted loss surrendered by the surrendering company has not changed one jot and likewise the total amount as claimed to exhaustion by the first claimant and the excess claimed by the second claimant company remain the same.

[60] For the DGIR to take the stand that the 'irrevocable election' extends to the amount claimed inter se between the two claimant companies would leave no room for the application of s 44A(6) of the ITA. Parliament could not have legislated in vain and the words in s 44A(6) are not there for decorative purpose.

[61] What is prohibited by the 'irrevocable election' must be strictly interpreted for it has the effect of the taxpayer in Berjaya Golf having more tax imposed on it when it is not allowed to maximise the losses that it could claim to reduce its taxable income proportionately. Even if there is doubt as to whether the 'irrevocable election' once made cannot be revoked where the apportioned amount of the loss to be utilised by the claimant companies are concerned, such a doubt is to be resolved in favour of the taxpayer Berjaya Golf.

[62] We would allude to the principles of interpreting taxing statutes as enunciated in the Federal Court case of *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 at p 130; [2004] 2 CLJ 265 at pp 299–300, which when properly applied, would produce a just outcome and effect. His Lordship Gopal Sri Ram JCA (later FCJ) drew together the various strands of interpretation of taxing statutes and observed as follows:

The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739:

> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.
>
> Secondly, '... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used' (per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v Regeim* [1945] 2 All ER 499; [1946] AC 119.)
>
> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

In my respectful view, s 17A of the Interpretation Acts 1948 and 1967 neatly fits into and is complementary with the third principle in the judgment of Lord Donovan. Hence, the governing principle is this: When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein. Imposing a tax by means of subsidiary legislation on a person not identified in the parent Act produces an absurd and unjust result and therefore does promote its purpose or object.

[63] In applying the various strands of statutory interpretation as referred to above, we find that the correction, amendment or revision made to the amount of adjusted loss claimed by the first claimant company and the second claimant company does not violate the requirement of an 'irrevocable election' under s 44A(2)(a)(iv) of the ITA and that the clear words of s 44A do not prohibit the taxpayer here in Berjaya Golf from claiming what is now a higher loss when overall the amount of adjusted loss surrendered and claimed remain the same and constant.

Whether there is any error or mistake on the part of the taxpayer that justifies the application for relief under s 131(1) of the ITA 1967

[64] In a perfectly imperfect world, errors and mistakes would be made and if these cannot be corrected, the consequences may be severe. In the context of tax submission and payment, more tax would have to be paid with no recourse for recouping. Thankfully the law recognises the fallibility of being human and gives some leeway for errors or mistakes to be corrected. There is a relief provided in respect of error or mistake in s 131 of the ITA, the relevant subsections being as follows:

> 131 Relief in respect of error or mistake
>
> (1) If any person who has paid tax for any year of assessment alleges that an assessment relating to that year is excessive by reason of *some error or mistake in a return or statement made by him for the purposes of this Act and furnished by him to the Director General* prior to the assessment becoming final and conclusive, he may within five years after the end of the year of assessment within which the assessment was made *make an application in writing to the Director General for relief*.
>
> (2) On receiving an application under subsection (1) the Director General shall inquire into the matter and, subject to this section, *shall give by way of repayment of tax such relief in respect of the alleged error or mistake as appears to him to be just and reasonable*. (Emphasis added.)

[65] The question then is whether a correction, amendment or revision of the amount claimed by the second claimant company in the taxpayer Berjaya Golf is nevertheless permitted under a s 131(1) relief under an error or mistake. Berjaya Golf had revised the amount of losses claimed as a consequence from the DGIR's audit on Berjaya Land as the first claimant where Berjaya Land's chargeable income was reduced.

[66] As submitted by learned counsel for the taxpayer respondent, this resulted in Berjaya Air as the surrendering company revising the group relief form and surrendering the same amount of RM16,300,200 such that Berjaya Land as the first claimant claiming RM3,939,862 and the taxpayer/respondent as the second claimant claiming RM12,360,338.

[67] Thus, the taxpayer/respondent's revising of the amount of losses claimed from the surrendering company is as a result of an erroneous belief that it was only entitled to claim up to the maximum of RM1,684,688 from Berjaya Air and that by claiming this amount, it would have fully utilised together with Berjaya Land the adjusted losses surrendered by Berjaya Air in accordance with the surrendering and claimant companies' irrevocable elections under s 44A(2)(a)(iv) of the ITA.

[68] Clearly and plainly, there was an error or mistake in the taxpayer/Berjaya Golf's submission of its original tax returns and claiming of the original amount of RM1,684,688 from Berjaya Air instead of the rightful amount of RM12,360,338. It was a mistake traceable to Berjaya Land when it erroneously or mistakenly did not deduct certain allowable expenses from its income for purpose of tax and so ended up paying more tax than what it should be paying. Such an error or mistake was discovered following a tax audit by the DGIR.

[69] It was a genuine mistake for ordinarily one would conduct one's business to pay less rather than paying more tax without running foul of evading tax but arranging one's financial affairs so as to avoid paying tax. Here there was no element of an afterthought or of mala fide or manipulation or an abuse of the relevant provisions of the ITA in particular s 44A.

[70] We are, in agreement with the High Court when it held as follows:

> [24] The appellant has therefore demonstrated that there was a mistake on their part arising from the audit by the respondent on BLB the first claimant and had seek (sic) for relief in respect of error or mistake under s 131(1) of the ITA to revise the adjusted loss claimed from RM1,684,688 to RM12,360,338.
>
> ...
>
> [38] It is of the considered view that there has been an error or mistake committed by the appellant within the meaning of s 131 of the ITA. The fact that the appellant had revised the amount of losses claimed from the surrendering company is as a result of an erroneous belief that it was only entitled to claim up to the maximum of RM1,684,688 from BASB and that by claiming this amount, it would have fully utilised the adjusted losses surrendered by BASB together with BLB in accordance with the surrendering and claimant companies' irrevocable elections under s 44A(2)(iv) of the ITA. The appellant had acted by mistake or there had been an unintentional error when the appellant submitted its original tax returns and claiming for the original amount of RM1,684,688 from BASB instead of the rightful amount of RM12,360,338. The mistake on the part of the appellant became glaring, obvious or self-evident by the fact that the respondent's audit on BLB was known. It is definitely not an afterthought nor one of manipulation on the part of the appellant as alleged by the respondent.

[71] Consistent with the recognition of the fallibility of being human, our courts have interpreted an 'error or mistake' generously. Thus, in *J Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [1999] MSTC 3037 at p 3044, the meaning of error or mistake for the purpose of s 131(1) of the ITA was explained as follows:

> The section applies when a person has made an error or mistake in a return or statement. The words 'error' and 'mistake' are defined in *Black's Law Dictionary* (6th Ed) as follows:

> *Error*. A *mistaken judgment or incorrect belief* as to the existence or effect of matters of fact, or a *false or mistaken conception* or application of the law.
>
> Such a mistaken or false conception or application of the law to the facts of a cause as will furnish ground for a review of the proceedings upon a writ of error. A mistake of law, or false or irregular application of it, such as vitiates the proceedings and warrants An act involving a departure from truth or accuracy; a mistake; an inaccuracy; as, an error in calculation. State ex rel.
>
> *Smith v Smith*, 197 Or 96, 252 P 2d 550, 555.
>
> *Mistake* Some *unintentional act omission, or error arising from ignorance*, surprise, imposition, or misplaced confidence. A state of mind not in accord with reality. A mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. *Salazar Steelman*, 22 Cal App 2d 402, 71 P2d 79, 82. See also Error; Ignorance. (Emphasis added.)

[72] It is a case of it is easier to detect an 'error or mistake' than it is to describe one. Granted there may be situations where a taxpayer based on advice given by its tax consultants may have made a conscious choice to elect to take a course of action which later may prove to be less advantageous to the taxpayer. In such a case, the DGIR may not want to exercise its discretion to allow relief for it may not be just and reasonable, after having taken professional advice and acted accordingly, to then later backtrack and claim that the election was made under an 'error or mistake'.

[73] Thus, the Hong Kong Court of Appeal case of *Extramoney Ltd v Commissioner of Inland Revenue* [1997] 2 HKC 38 at p 50 can be distinguished based on its own facts and circumstances when dealing with the Hong Kong Inland Revenue Ordinance's similar provision in their s 70A as is evident from the passage cited by the learned SRC as follows:

> There is no definition of 'errors or omissions' in the Ordinance.
>
> But it is clear that not every error or omission falls within s 70A and is accepted for the purpose of this section ...
>
> In my view, for the purpose of s 70A, the meaning of 'error' given in the *Oxford English Dictionary* (p 277) would be appropriate, that is, 'something incorrectly done through ignorance or inadvertence; a mistake'. *I do not think that a deliberate act in the sense of a conscientious choice of one out of two or more courses which subsequently turns out to be less than advantageous or which does not give the desired effect as previously hoped for can be regarded as an error within s 70A*. It is even worse if the deliberate act is motivated by fraud or dishonesty. But the question of fraud or dishonesty need not arise.
>
> Hence, in the context of the present case, *if there is a change of opinion of the auditors or accountants in respect of the accounts, the first opinion cannot be regarded as an error or omission within the section*. Similarly, if there is a change of mind of the directors

> of the company in connection with how any part of the accounts should be made up, the previous decision will not be regarded as an error or omission. Nor is it an error or omission if it is merely a difference in the treatment of certain items in the accounts by those preparing or approving the accounts. If this were permitted, the director or officer of a company will be tempted at a later stage to try and 'improve' the company's accounts or change his own decisions if this is to his advantage. *This would be contrary to the spirit of the Ordinance that there should be finality in taxation matters*. The whole statutory scheme provided in the Ordinance simply cannot work. (Emphasis added.)

[74] We therefore have no quibbles with the conclusion arrived at by the Hong Kong High Court in the above case which interpretation was approved by the Hong Kong Court of Appeal in *Moulin Global Eyecare Trading Ltd (in liq) v Commissioner of Inland Revenue & Anor* [2012] 3 HKC 272 at p 296 where the Court of Appeal held that a deliberate act is not an error within the meaning of that provision.

[75] Whether or not a conscious choice is also a conscientious choice or that a decision is a deliberate one, must necessarily be fact-sensitive and fact-centric, lest after providing for relief under an 'error or mistake' it is only confined to acts done carelessly or performed perfunctorily as in arithmetical or typographical errors. A balance must certainly be drawn between allowing some flexibility where reliefs due to an 'error or mistake' are concerned without jeopardising the principle of finality in taxation matters.

[76] We were reminded by the learned SRC of the principle in construing a relief provision in a taxing statute, as both s 44A and s 131 of the ITA are a relief-giving provision, in that the taxpayer must prove that it falls within the requirements of the provision. She cited the case of *Ben-Odeco Ltd v Powlson (Inspector of Taxes)* 1978 STC 460 where the House of Lords in the speech of Lord Russell of Killowen construed a provision giving relief as follows at p 471:

> I start, My Lords, with the fact that this is a provision affording relief from tax. *The taxpayer must persuade that he is within it. If the reasons pro and con were in precise balance, the taxpayer on that basis would lose*. (Emphasis added.)

[77] Lord Hailsham of St Marylebone in similar vein observed at p 467 as follows:

> To qualify for an allowance the taxpayer must bring himself within the conditions set by the benevolence of Parliament.

[78] It was further substantiated that even if there is a doubt or ambiguity in the said provision, then the said provision must be construed in favour of the Revenue as was propounded in *Littman v Barron (Inspector of Taxes)* [1951] Ch 993 at p 1004 where Lord Cohen LJ said:

> I agree ... that the principle that in case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a tax payer relief in certain cases from a section clearly imposing liability.

[79] The learned SRC also highlighted that the above principle had been adopted and applied by our court in *Hamdan bin Abdul Hamid @ Hamid bin Abdul Rahman v Ketua Pengarah Hasil Dalam Negeri* [2010] 4 MLJ 556 at pp 565–566 as follows:

> [21] In the event I err and there is doubt and ambiguity in construing para 12 Schedule 2 and Part III of Schedule 5 of the RPGT Act, I am inclined to agree with the submission of learned revenue counsel that *with respect to the gift of relief, it is not on imposing tax, where if there is doubt, it should be construed in favour of the taxpayer, but it should be construed in favour of the Crown*. Support for this proposition is found at p 29 of *Revenue Law in Singapore and Malaysia — Cases and Commentary* (2nd Ed) by Leo D Pointon, wherein it is stated 'Where, however, a statute provides for the taxpayer to be exempted from taxation this will be strictly construed against him' and the learned author cited the case of *Littman v Barron* [1951] 2 All ER 393; (1951) 33 TC 373 (UK Court of Appeal) Cohen LJ (at p 386): '... I agree ... that the principle that in case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability'.
>
> [22] Further support can be drawn from the case of *Ben-Odeco Ltd v Powlson (Inspector of Taxes)* [1978] ST 460 at p 471 the House of Lords (per Lord Russell of Killowen) 'I start, my Lords, with the fact that this is a provision affording relief from tax. The taxpayer must persuade me that he is within it. If the reasons pro and con were in precise balance, the taxpayer on that basis would lose. But in upholding the view of the Special Commissioners and of Brightman J, as I do, I find the balance is in fact against the taxpayer company'. (Emphasis added.)

[80] We are not convinced that there is any ambiguity with respect to whether the requirements of s 44A of the ITA have been met. In particular there had been full utilisation of the adjusted losses by the first claimant company Berjaya Land, albeit a lower amount before the excess, now a bigger amount, was subsequently utilised by the second claimant company Berjaya Golf. The important thing is that the total amount of losses surrendered and claimed remain the same and constant.

[81] No doubt a correction, amendment or revision had to be made to the relevant Form C (RK-T) by Berjaya Golf, the respondent under s 131(1) of the ITA. An 'irrevocable election' under s 44A(2)(a)(iv) is amenable to a correction under an 'error or mistake' under s 131; it is not antithetical or averse to it. Section 131(1) of the ITA is gracious and generous enough to accommodate the 'irrevocable election' and more so when what are irrevocably elected are the surrendering company, the claimant company or companies in its order of priority and the amount surrendered and claimed accordingly. What is being

corrected is the amount inter se between the two claimant companies without altering the total amount surrendered and claimed or the surrendering company and the claimant companies.

[82] The related companies within the group ie Berjaya Air, Berjaya Land and Berjaya Golf had not revoked their irrevocable election but that they had merely made adjustments to, the amount to be claimed by the two claimant companies in the light of the tax audit by the DGIR that had substantially reduced the taxable income of Berjaya Land which correspondingly necessitated a lesser sum of the adjusted loss claimed; leaving a bigger sum for Berjaya Golf to claim without adjusting the original total amount surrendered and claimed.

[83] There is nothing in the ITA to exclude s 131(1) from its application to s 44A of the ITA. If Parliament had wanted to exclude s 131(1) from its application to s 44A of the ITA, it could easily have done so. In *Ketua Pengarah Hasil Dalam Negeri v OKA Concrete Industries Sdn Bhd* (2015) MSTC 30-091 it was held that:

> If Parliament had intended reinvestment allowance to be restricted only to 'production area', then Parliament would have surely specified this clearly in Schedule 7A ...

[84] Parliament must be presumed not to have intended any internal inconsistencies between provisions housed in the same statute. Flowing from that the different provisions, in this case s 44A and s 131 of the ITA must be interpreted harmoniously with each other as Parliament does not legislate in vain. The Federal Court in *Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals* [2017] 2 MLJ 421 observed as follows:

> [44] ...This court in the case of *Krishnadas a/l Achutan Nasir & Ors* [1997] 1 MLJ 94 had held:
>
> > *The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent* primarily by reference to the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For *Parliament does not legislate in vain* by the use of meaningless words and phrases ... (Emphasis added.)

[85] The Supreme Court then had in *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 at p 272 placed on premium on a harmonious interpretation:

> It is our view that, in accordance with established canon of construction of statutes, s 214A(1) should not be construed in isolation, divorced from other provisions of the section. It is well established that *every section of an Act must be considered as a whole and self-contained* with the inclusion of saving clauses and provisos.

Subsections in a section must, therefore, be read as part of an integral portion and being inter-dependent, each portion throwing light, if need be, on the rest, and *harmonious construction should be placed on their words for the purpose of giving effect to the legislative intent and object*. ... (Emphasis added.)

[86] The Federal Court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141; [2020] 1 CLJ 1 explained what the principle of harmonious interpretation would entail as follows:

[78] In this regard, it would be convenient for us to discuss the doctrine of harmonious constructions. To put it simply, the doctrine of harmonious construction means a statute should be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such an interpretation is beneficial in avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. The five main principles of this doctrine/rule are as follows:

(i) the court must avoid a head on clash of seemingly contradictory provisions and they must construe the contradictory provisions so to harmonise them (see *Commissioner of Income Tax v Hindustan Bulk Carriers* [2002] 3 SCC 57, p 74);

(ii) *the provision of one section cannot be used to defeat the provision contained in another unless the court, despite all its efforts, is unable to find a way to reconcile their differences*;

(iii) when it is impossible to completely reconcile the differences in contradictory provisions, *the courts must interpret them in such a way that effect is given to both provisions as much as possible* (see *Sultana Begum v Prem Chand Jain* AIR 1997 SC 1006, pp 1009, 1010);

(iv) courts must also keep in mind that *interpretation that reduces one provision to useless or dead lumber is not harmonious construction* (see *Commissioner of Income Tax v Hindustan Bulk Carriers* [2002] 3 SCC 57, p. 74); and

(v) to harmonise is not to destroy any statutory provision or to render it fruitless.

[79] In a nutshell, the doctrine requires that the legislation be construed in a way which would achieve a harmonious result, and that construction should favour coherence in the law. (Emphasis added.)

[87] More recently the Federal Court in *Mohd Najib bin Hj Abd Razak & Anor v Government of Malaysia and another appeal* [2023] 6 MLJ 483; [2023] 10 CLJ 329 held that s 106(3) of the ITA must be read together with the other provisions of the Act:

[65] As stated earlier, *the ITA does not comprise s 106(3) alone. That provision must be read together with the other provisions of the Act*, for example s. 106 in its entirety, as

well as the provisions of ss 103 to 107 which fall within Part VII of the ITA entitled 'Collection and Recovery of Tax'. (Emphasis added.)

[88] The Federal Court further held that a construction of s 106(3) of the ITA in the context of the entirety of the Act gives a more accurate picture of whether judicial power or function is removed or suspended for the purposes of constitutional review.

[89] Applying the principle of harmonious interpretation to the two different provisions of the ITA, clearly s 131(1) is not repugnant to s 44A(2)(a)(iv) of the ITA and that room may be given for claiming a relief under an 'error or mistake' which is still reconcilable with the scope of the 'irrevocable election'. Invoking s 131(1) does not have the effect of revoking the 'irrevocable election' but rather that of giving room for an 'error or mistake' to be redeemed.

[90] We therefore agree with the High Court that the SCIT had erred in holding that s 131(1) of the ITA is not applicable to the taxpayer here. There was unmistakably an 'error or mistake' that could be corrected, amended or revised within the broad and benevolent provision of s 131(1) of the ITA.

[91] Finally, we would add that an amending provision like s 44A of the ITA should be read generously to remove unnecessary obstacles to companies harnessing its beneficial provision in their tax planning for so long as the explicit requirements as set out have been complied with. It would be both just and reasonable for the respondent taxpayer to be granted the relief under s 131(1) of the ITA.

DECISION

[92] We had therefore dismissed the appeal of the DGIR, having found no merits in its appeal. The decision of the High Court was affirmed. We allowed costs of RM15,000 to the respondent.

Appeal dismissed and decision of High Court affirmed.

Reported by K Selvaraju